

U.S.C. § 1681b(b)(2) and 15 U.S.C. § 1681b(b)(3), two provisions of the Fair Credit Reporting Act.

3. The First Amended Complaint (“FAC”) alleges that ClosetMaid is subject to liability pursuant to 15 U.S.C. § 1681n(1)(A) entitled “Civil Liability For Willful Noncompliance”. This FCRA civil liability provision provides:

(a) In general. “Any person who *willfully fails to comply with any requirement imposed under this title with respect to any consumer* is liable to that consumer in an amount equal to the sum of

(1)

(A) any actual damages sustained by the consumer as a result of the failure or damages of not less than \$100 and not more than \$1,000; . . .

3. The First Amended Complaint (ECF # 16) alleges that Defendant violated the *requirements* of Disclosure and Pre-Adverse Action provisions of the Fair Credit Reporting Act. *See* 15 U.S.C. § 1681b(b)(2) (the “Disclosure Provsion”) and 15 U.S.C. § 1681b(b)(3) (the Pre-Adverse Action Provision”) with respect to the use of consumer reports for employment purposes.

4. On April 27, 2011, this Court entered a Memorandum and Order certifying the action as a class action on behalf of a defined Disclosure Class and a Pre-Adverse Action Sub-class. Exhibit 1. *See also Reardon v. Closetmaid Corp.*, CIV.A. 08-1730, 2011 WL 1628041 (W.D. Pa. Apr. 27, 2011).

5. On September 9, 2011, this Court entered an Order clarifying the class definitions in the Class Certification Order.

6. The Plaintiffs then undertook to send Notice Of Class Action to approximately 2000 Disclosure class members and 70 Pre-Adverse Action sub-class members. On September 28, 2012 Class Notice was mailed to 2,147 potential members of the Disclosure Class and 72 members identified as being in the Pre-Adverse Action Sub-

class. Thereafter, 34 potential class members elected to opt-out after receiving the class notice.

Liability As To The Disclosure Class

7. Section § 1681b(b)(2) provides:

Except as provided in subparagraph (B) . . . a person may not procure a consumer report, or cause a consumer report to be procured, for employment purposes with respect to any consumer, unless -

(i) a clear and conspicuous disclosure has been made in writing to the consumer at any time before the report is procured or caused to be procured, in a document that consists solely of the disclosure, that a consumer report may be obtained for employment purposes; and

(ii) the consumer has authorized in writing (which authorization may be made on the document referred to in clause (i)) the procurement of the report by that person.

15 U.S.C. § 1681b(b)(2).

8. The undisputed facts demonstrate that ClosetMaid violated the requirement of § 1681b(b)(2) by incorporating a prospective Waiver Or Release of Rights in the document that was used to obtain job applicants' written consent that a consumer report could be obtained about them for employment purposes. The plain, unambiguous language of § 1681b(b)(2) prohibits the inclusion of such a Waiver Of Rights.

9. ClosetMaid's violation of § 1681b(b)(2) was "willful" because its reading of § 1681b(b)(2) to authorize the inclusion of a Waiver Of Rights provision was "objective unreasonably " pursuant to the 3 pronged analysis set forth in *Fuges v. Sw. Fin. Servs., Ltd.*, 707 F.3d 241, 248 (3d Cir. 2012).

Liability As To The Pre-Adverse Action Sub-Class

10. The full text of the Pre-Adverse Action provision states:

Except as provided in subparagraph (B) [in cases of a consumer applying for a position over which the Secretary of Transportation may

establish qualifications], in using a consumer report for employment purposes, *before taking any adverse action based in whole or in part* on the report, the person *intending* to take such adverse action shall provide to the consumer to whom the report relates –

- (i) a copy of the report; and
- (ii) a description in writing of the rights of the consumer under this subchapter, as prescribed by the Federal Trade Commission under section 1681g(c)(3) of this title.

15 U.S.C. § 1681b(b)(3).

11. The plain language of this provision requires an employer to establish a Pre-Adverse Action procedure that: 1) identifies job applicants who are entitled to Pre-Adverse Action notices, that is, those job applicants as to whom the employer might consider not hiring based upon the results of a consumer report, and; 2) establishes a sufficiently long “hold” on any final employment decision until the disclosures required by 15 U.S.C. § 1681b(b)(3) are provided to them.

12. No material issue of fact exists that ClosetMaid has failed to establish procedures designed to comply with § 1681(b)(B)(3). *First*, there is no dispute that ClosetMaid has failed to adopt a procedure that identifies job applicants who are entitled to a Pre-Adverse Action Notice-- that is those job applicants at ClosetMaid as to whom it might decide not to hire. *Second*, ClosetMaid has failed to establish any procedure that puts a final employment decision on hold until job applicants are provided the required disclosures.

13. ClosetMaid’s violation of § 1681(b)(B)(3) was “willful” because its reading of §1681(b)(B)(3) as allowing the required disclosures to be made only if the sole, final reason for not hiring was based upon the results of a consumer report is “objective unreasonably ” pursuant to the 3 pronged analysis set forth in *Fuges v. Sw.*

Fin. Servs., Ltd., 707 F.3d at 248.

Wherefore, it is respectfully requested that this Court enter partial summary judgment in favor of the Disclosure Class and the Pre-Adverse Action Sub-Class as to liability of Defendant ClosetMaid on the claims in the FAC. A proposed Order Of Court defining the scope of the proposed summary judgment is attached hereto.

May 24, 2013

Respectfully submitted,

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For herself and on behalf of
all similarly situated
individuals.

s/ James M. Pietz

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